Walking the Constitutional Beat: Fourth Amendment Implications of Police Use of Saturation Patrols and Roadblocks

I. INTRODUCTION

Crime seems to be an inevitable part of the American existence. Few citizens, if any, remain unaffected by crime. Generally, police departments have attempted to deter criminal activity by having a regular shift of officers patrol a neighborhood and respond to radio calls for police assistance.[1]

However, a new type of criminal has emerged on American streets. Armed with uzis and AK-47s, gang members and drug dealers are descending upon formerly "safe" neighborhoods with increasing frequency. From 1985 to 1990 alone, arrests for drug abuse violations rose more than twenty-three percent.[2] Moreover, this figure does not even represent the drug-related offenses committed in order to buy drugs or to maintain drug/gang territories.[3] Unfortunately, traditional crime control methods seem to have little impact on these problems.[4]

---

[1] George L. Kelling and David Fogel, *Police Patrol—Some Future Directions, in* THE FUTURE OF POLICING 156-60 (Alvin W. Cohn ed., 1978).

[2] FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 165 (1985) (702,882 total number of drug abuse violation arrests for 1985); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 165 (1986) (691,882 total number of drug abuse violation arrests for 1986); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 165 (1987) (811,078 total number of drug abuse violation arrests for 1987); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 169 (1988) (850,034 total number of drug abuse violation arrests for 1988); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 173 (1989) (1,075,728 total number of drug abuse violation arrests for 1989); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 175 (1990) (869,155 total number of drug abuse violation arrests for 1990).

[3] FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 175 (1990). Other drug offenses related to buying drugs include robbery and burglary. Some assaults and murders can also be included as drug-related offenses related to maintaining drug territories. In order to maintain drug trafficking boundaries, drug dealers often must use violence. In addition, gang activity often correlates with drug activity. Gangs traffic drugs in their area. Thus, gang-related crime often is also drug-related crime. *See generally* CALIFORNIA COUNCIL ON CRIM. JUSTICE, STATE TASK FORCE ON GANGS AND DRUGS xii (1989) [hereinafter CALIFORNIA COUNCIL ON CRIM. JUSTICE].

[4] PETER K. MANNING, POLICE WORK: THE SOCIAL ORGANIZATION OF POLICING, 348 (1977); CHARLES P. MCDOWELL, POLICE IN THE COMMUNITY 112 (1975); JEROME H. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE: POLICE INNOVATION IN SIX

Faced with these rising crime statistics, increasing public scrutiny, and the knowledge that traditional crime control methods largely have proven unsuccessful against drugs and gang violence, police departments and state legislatures are proposing numerous ideas to combat these problems, ranging from increasing penalties for drug and gang-related crimes to publicly whipping criminals.[5] While many ideas are dismissed as obvious violations of civil rights, these brainstorms have produced some innovations in policing. Two noteworthy techniques being implemented in several cities are saturation patrols and roadblocks.[6] These techniques represent an aggressive approach to crime control because the goal is to establish a dominant police presence in an area in order to deter individuals from committing crime.[7] With saturation patrols and roadblocks, police departments attempt to achieve this dominant presence by placing numerous officers and/or barricades in high-crime areas of the city.[8] Then, the officers engage in frequent police-citizen contacts.[9] However, while deterring criminals from an area, use of saturation patrols and roadblocks also has the *potential* to violate individuals' fourth amendment rights.[10]

This Note examines the possible problems with using aggressive policing tactics by focusing on programs in three geographic areas: Operation A.C.E. in Columbus, Ohio; Operation Hammer in Los Angeles, California, as well as the informational checkpoints in Paramount, a suburb of Los Angeles; and Operation Clean Sweep in Washington, D.C. Part II of this Note discusses the theoretical purposes as well as the actual practices of these programs. Part III

Kansas City Preventive Patrol experiment. In this study, the city was subdivided into three areas. In one area, a regular shift of patrol officers was assigned to patrol the area when not answering radio calls. In another area, the number of officers was doubled for patrolling the area when not answering calls. In the final area, preventive patrol was eliminated altogether, and officers only went into the area to answer calls. Generally, the number of officers who patrolled an area seemed to have little impact on crime. Although this study has some implications for using saturation patrols, unlike the programs discussed in this Note, there was no public announcement that the police were putting more officers in certain areas of the city. WILSON, *supra*.

[5] Seth Mydans, *Powerful Arms of Drug War Arousing Concern for Rights*, N.Y. TIMES, Oct. 16, 1989, at A1.

[6] *See* Columbus City Police Dep't, News Release No. 91-26 (May 29, 1991) (on file with the author); LOS ANGELES POLICE DEP'T, OPERATION GUIDELINES, HAMMER TASK FORCE (June 7, 1988) [hereinafter L.A. POLICE DEP'T OPERATION GUIDELINES]; Ex. 1 Cr. No. 86-0331, Galberth v. United States, 590 A.2d 990 (D.C. App. 1991) (Exhibit 1 is a section of the Washington, D.C. Police Department's manual for Operation Clean Sweep).

[7] Ex. 1 Cr. No. 86-0331, *Galberth*, 590 A.2d at 990.

[8] *Id.*

[9] *Id.*

[10] *See* Glass v. Columbus, No. C2-91-775 (S.D. Ohio, filed Sept. 20, 1991); *Galberth*, 590 A.2d at 995.

reviews the legal background for street encounters and roadblocks. Part IV analyzes the constitutional implications of these programs, specifically examining the constitutional questions which remain unanswered by the Supreme Court in relation to such programs. Finally, Part V explores the future for police innovation and suggests possible alternatives to long-term use of saturation patrols and roadblocks.

II. BACKGROUND ON POLICE INNOVATION IN COLUMBUS, OHIO; LOS ANGELES, CALIFORNIA; AND WASHINGTON, D.C.

A. *Operation A.C.E.*

"[W]e're going to take the neighborhood back."[11] This sentiment captures the essence of the Columbus City Police Department's new program, Operation A.C.E. (Active Criminal Eviction). Announced in a news release on May 29, 1991, the stated purpose of Operation A.C.E. is "[t]o reduce street crime from groups loitering to sell drugs or commit prostitution."[12] Unlike other specialized divisions of the police force which focus on high-level suppliers of drugs, A.C.E. is aimed at ridding neighborhoods of users and low-level sellers.[13] By focusing on street-level groups, officials hope to make neighborhoods safe again for residents to engage in "normal" community life.[14]

To accomplish this goal, the A.C.E. program originally was to employ four techniques. First, in a neighborhood identified by the police department as a high-crime area, officers would enlist community support by working with civic groups in the area. Officers would explain other elements of the program to the groups and also gain information about local crime activity from these organizations.[15] In neighborhoods without a civic group, crime prevention officers would go door-to-door to explain the program to area residents.[16] Second, the police department planned to do some selective traffic enforcement, more popularly known as roadblocks.[17] Under this technique, all vehicles using

---

[11] Steve Stephens, *Scaled-down Sweep Hits North Side Last Night,* COLUMBUS DISPATCH, June 5, 1991, at B4 (quoting Commander Richard Morgan of the Columbus Police Department).

[12] Columbus City Police Dep't, *supra* note 6.

[13] Stephens, *supra* note 11.

[14] *Id.*

[15] Columbus City Police Dep't, *supra* note 6.

[16] *Id.*

[17] *Id.*

a particular roadway would be briefly detained so officers could check drivers' licenses and registrations.[18] In this way, officials hoped to cut off illicit sellers from their buyers.[19] However, this portion of the A.C.E. program has not been implemented because of concerns arising from *Galberth v. United States*,[20] the case which found Operation Clean Sweep's roadblocks unconstitutional.[21] Third, saturation patrols, more popularly known as sweeps, would be introduced into specified neighborhoods.[22] With saturation patrols, numerous foot patrol officers descend on a neighborhood and ask passersby for identification, ask them what they are doing in the neighborhood, and run warrant checks on suspicious persons.[23] Finally, after initial saturation patrols were brought into an area and the area was deemed secure, the department would discontinue the patrols.[24] Additionally, to keep the area "crime free," the department would work with other city offices such as those for street lighting and sanitation.[25]

The most controversial aspect of Operation A.C.E. has been the saturation patrols. Once a neighborhood has been targeted for an A.C.E. offensive, officers infiltrate the neighborhood and question individuals on the street. If the citizen complies with the questioning, officers fill out field identifier cards.[26]

---

[18] *Id.*

[19] *Id.*

[20] 590 A.2d 990 (D.C. Cir. 1991).

[21] Felix Hoover, *Roadblocks in Short North on Hold*, COLUMBUS DISPATCH, June 4, 1991, at C1.

[22] Columbus City Police Dep't, *supra* note 6.

[23] Glass v. Columbus, No. C2-91-775 (S.D. Ohio, filed Sept. 20, 1991). Although this suit by the ACLU was dropped, the facts alleged serve as a good basis for understanding how Operation A.C.E. is being implemented as well as possible concerns raised by this program. The ACLU described police-citizen contact in this manner:

> [A] citizen is approached by several foot patrolmen. The citizen is required to state his name, produce some identification, and explain his presence in the area. The citizen is not free to leave until after the police have called over the radio for a computer check to determine whether the citizen has an outstanding arrest warrant.

Id. at 9.

[24] Columbus City Police Dep't, *supra* note 6.

[25] *Id.*

[26] Leslie Pereira, *Ace Winning Folks' Hearts*, COLUMBUS DISPATCH, July 14, 1991, at B1. The Columbus City Police Department contends that these field identifier cards were filled out only on persons engaging in suspicious activities. Cards were not filled out for individuals who complied with questioning. Letter from Commander D. James Dean, the Columbus Police Dep't, to the author (June 3, 1992) (on file with the author).

These cards list information such as name, age, and physical description.[27] Upon completion, the card is sent to the narcotics bureau or the crime analysis unit to check possible connections to local crimes.[28] If the individual objects to the questioning, the individual is told that ". . . the area is one of high crime and if the person is there seeking drugs or prostitution, an arrest is likely, if not certain."[29] The police department contends, however, that the individual is then free to leave.[30]

Vigorous enforcement of all criminal and traffic laws, including minor misdemeanors, is a key tactic of the saturation patrols.[31] This strict enforcement often acts as a means for stopping individuals in order to check for outstanding warrants or to search for drugs and weapons.[32] Jaywalking, in particular, appears to be a common offense for which individuals are stopped.[33] Once an individual is stopped, warrant checks can take up to thirty minutes.[34]

The major concern with the saturation patrols is that officers are subjecting individuals to "Terry-type" stops[35] without reasonable suspicion to stop them.[36] In response to this concern, the Columbus City Police Department drafted a manual discussing relevant Supreme Court cases.[37] Before officers can be assigned to the Operation A.C.E. unit, they must receive a passing score of 70% or better on a test of these cases.[38]

---

[27] Letter from Commander D. James Dean, the Columbus Police Dep't, to the author (June 3, 1992) (on file with the author).

[28] *Id.*

[29] *ACE is Played, Citizens Back Police Clean Sweeps*, COLUMBUS DISPATCH, July 15, 1991, at A6.

[30] *Id.* There are conflicting views on whether individuals are free to leave at this point. The ACLU contends that individuals are forced to stay until a warrant check is completed. However, the Columbus Police Department maintains that individuals are free to go if they indicate that they do not want to answer questions.

[31] Columbus City Police Dep't, *supra* note 6.

[32] Steve Stephens, *Police Begin Second Sweep*, COLUMBUS DISPATCH, June 20, 1991, at C1.

[33] Glass v. Columbus, No. C2-91-775, 10-13 (S.D. Ohio, filed Sept. 20, 1991); Pat Schmucki, *Rights Violated Under Martial Law*, COLUMBUS ALIVE, July 10–24, 1991, at 5.

[34] *Glass*, No. C2-91-775 at 10–13.

[35] A "Terry-type stop" is based on Terry v. Ohio, 392 U.S. 1 (1968), in which the Supreme Court determined that an officer can detain an individual for a limited time if he has reasonable suspicion that the individual has committed or is about to commit a crime.

[36] *Terry*, 392 U.S. at 1.

[37] COLUMBUS CITY POLICE DEP'T, TRAINING MANUAL FOR INVESTIGATORY STOPS (discussing, inter alia, Terry v. Ohio, 392 U.S. 1 (1968) and Sibron v. New York, 392 U.S. 40 (1968)).

[38] *Id.*

B. *Operation Hammer and the Paramount Checkpoints*

In the last decade, Los Angeles literally has become a war zone, a city beseiged by gang violence and crime. In 1989, the California Council on Criminal Justice issued a report estimating that there are approximately 250 gangs in Los Angeles with a membership in excess of 30,000.[39] The Council further reported that in 1987 there were 387 gang-related homicides in the greater Los Angeles area.[40] To deal with this devastating situation, several programs have been introduced by the Los Angeles Police Department and sheriffs' departments in neighboring suburbs. Two such programs are Operation Hammer, implemented by the Los Angeles Police Department, and the Paramount checkpoints, implemented by the Los Angeles County Sheriff's Department.

Operation Hammer, as the name suggests, is an aggressive attack on gang problems. Operation Hammer began in 1988 as a task force aimed at curbing gang activity.[41] The purpose of the task force is two-fold: To improve community relations by emphasizing quality of service, and to rid Los Angeles streets of violent gang criminals.[42] Essentially, the police department wants to make life as miserable as possible for gang members while at the same time creating a highly visible police force for the rest of the community.[43]

As part of the program, each bureau of the police department acts as a separate component of the task force.[44] Within each bureau, a Field Commander is selected to organize activities for that bureau.[45] In particular, Field Commanders are responsible for disseminating the following information to other officers: 1) specific locations where gang activity is prevalent; 2) boundaries of specific gang territories; 3) identities of known gang members; 4) methods of identifying particular gangs; 5) identities of associate and rival gangs; and 6) other relevant information which would improve enforcement activities.[46] With this information, officers (usually in large numbers) go to

---

[39] CALIFORNIA COUNCIL ON CRIM. JUSTICE, *supra* note 3, at 7.

[40] *Id.*

[41] L.A. POLICE DEP'T OPERATION GUIDELINES, *supra* note 6.

[42] *Id.*; *see also* Letter from Lt. Hugh Halford, Los Angeles Police Dep't, to the author (July 29, 1992) (on file with the author).

[43] Sandy Banks, *The Legacy of a Slaying; Westwood Gang Shooting Alters Public Attitudes, Police Tactics*, L.A. TIMES, Sept. 11, 1989, at 82.

[44] L.A. POLICE DEP'T OPERATION GUIDELINES, *supra* note 6.

[45] *Id.*

[46] *Id.*

known gang locations and attempt to arrest gang members for anything they can,[47] from selling drugs to failing to pay parking fines.[48]

As in Los Angeles, the city of Paramount, a suburb of Los Angeles, has experienced problems with gang violence. In July, 1991, Paramount was affected by twenty-two gang-related shootings.[49] To combat this problem, Paramount tried a radically new idea in law enforcement. In August, 1991, Paramount began implementing checkpoints (roadblocks) to curb gang activity.[50] In order to comply with the California Attorney General's guidelines on roadblocks,[51] before a checkpoint is established, times and location of the checkpoints are first announced in the local media. Then, a warning sign is posted ahead of the checkpoint so that drivers can take an alternate route.[52] The sheriff's department employs a numerical formula for stopping cars at the checkpoint.[53] For example, every fourth car may be stopped. Officers then pass out pamphlets to the drivers who are stopped, seeking information about gang activity and suggestions on how to stop such activity.[54]

Officials contend that the purpose of these checkpoints is not to find individuals to arrest (however, blatant violators such as drunk drivers will be arrested). Instead, the sheriff's department wants to send a message to gang members that their activities will no longer be tolerated in the community.[55]

Two concerns arise from these programs. First, critics urge that Operation Hammer serves as a way for police officers to harass all youths, especially males.[56] In their view, probable cause for crimes is non-existent. Instead,

---

[47] Celeste Fremon, *G-Dog and the Home Boys, When Guns are Blazing and the Bullets Fly, the Gangsters of Pico-Aliso Turn to Father Gregory Boyle*, L.A. TIMES, Aug. 11, 1991, Magazine at A1.

[48] George Stein, *LAPD Nails 352 in Operation Hammer*, L.A. TIMES, Aug. 21, 1989, at B1.

[49] Janet Rae-Dupree, *Cars Stopped at Informational Gang Checkpoint in Paramount*, L.A. TIMES, Aug. 17, 1991, at B1.

[50] *Id.*

[51] Letter from Robert D. Robinson, Dir. of Public Safety for the City of Paramount, to the author (June 12, 1992) (on file with the author). Mr. Robinson indicates that these checkpoints strictly adhere to the Attorney General's guidelines.

[52] Rick Holguin, *Roadblocks to Curb Gangs to be Set Up in Paramount*, L.A. TIMES, Aug. 9, 1991, at A1.

[53] *Id.*

[54] *Id.*; Rae-Dupree, *supra* note 49.

[55] Rae-Dupree, *supra* note 49.

[56] *See* Fremon, *supra* note 47; Sylvester Monroe, *Complaints About a Crackdown; Minorities Charge That the Los Angeles Police Department's War on Gangs has Become a War on Their Communities*, TIME, July 16, 1990, at 20.

youths are considered "guilty until proven innocent."[57] Second, critics are concerned about the privacy intrusion of the Paramount checkpoints.[58] Carol Sobel, an attorney with the ACLU, suggests that if the sheriff's department is only looking for information, then "they should go door to door and drop (the pamphlets) in [the] mail."[59]

C. *Operation Clean Sweep*

If police officials of Operation A.C.E., Operation Hammer, and the Paramount checkpoints think that they have legal troubles, they should be thankful that they are not in charge of Operation Clean Sweep. Controversy appears to be the signature card of this program.

Established in August, 1986, the purpose of Operation Clean Sweep was to curb open-market drug transactions as well as violence associated with drugs in Washington, D.C.[60] This purpose was to be achieved by employing roadblocks, saturation patrols (jump-out squads), and street-level buy/bust tactics.[61] Uniform saturation patrols made officers highly visible to individuals in the area and officers were encouraged to use frequent contacts as a way to make the area as unpleasant as possible for narcotics dealers.[62] Like saturation patrols, roadblocks were implemented to disrupt narcotics trafficking patterns and to discourage potential customers from entering the area.[63] When setting up a roadblock, the Washington, D.C. Police Department emphasized choosing a site where safety and visibility could be afforded to oncoming motorists.[64] A systematic method of checking vehicles would be used rather than a random schedule.[65] For example, every third car would be stopped instead of the officers stopping whomever they felt like stopping. Adequate warnings also had to be afforded to motorists through signs, flares, or marked vehicles.[66] In addition to saturation patrols and roadblocks, the Washington, D.C. Police

---

[57] Monroe, *supra* note 56 (quoting Patricia Erickson, an attorney for the ACLU who contends that minority teenage males are particularly at risk of police brutality. The issue of police brutality, however, is beyond the scope of this Note.).

[58] Holguin, *supra* note 52.

[59] *Id.*

[60] Linda Wheeler & Sari Horwitz, *Operation Clean Sweep's Future Uncertain, D.C. Police Officials Seek to Revamp Drug Program to Cut Cost,* WASH. POST, Jan. 26, 1988, at A1.

[61] Ex. 1 Cr. No. 86-0331, Galberth v. United States, 590 A.2d 990 (D.C. App. 1991).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

Department also utilized a reverse buy/bust system in which undercover officers infiltrated open drug markets by purchasing narcotics.[67]

While officials hoped to curb drug markets with Operation Clean Sweep, the end result, instead, seems to have been conflict and abandonment of the program. Early in the program, owners of area businesses complained that the jump-out squad portion of Operation Clean Sweep was "killing business."[68] Moreover, officials had to defend the roadblock portion of Operation Clean Sweep in two lawsuits.[69] In *United States v. McFayden*, the Court of Appeals for the D.C. Circuit found the roadblocks employed in the sixth district of the city were constitutional because the roadblocks served the legitimate government interest of responding to traffic problems and checking for drivers' licenses and registrations.[70] However, in *Galberth v. United States*,[71] the District of Columbia Court of Appeals found a roadblock on Montello Avenue and Queen Street unconstitutional. That court determined that using a roadblock was not an effective way to achieve the city's goals of combatting violence and illegal drug activity.[72] Therefore, the city's goals did not outweigh privacy concerns.[73] The court remanded another case consolidated with *Galberth* involving a roadblock on 14th and Quincy Streets to the trial court, so the trial court could make specific findings about the principal purpose for that roadblock.[74]

Overall, the main concern with Operation A.C.E., Operation Hammer, Operation Clean Sweep, and the Paramount checkpoints is that individuals are detained and searched without the amount of suspicion required by the United States Constitution. Supporters of these programs, however, maintain that they are completely constitutional. Therefore, to grasp the complexities of the legal issues involved with these programs, it is important to have a basic understanding of the Supreme Court's treatment of search and seizure questions.

---

[67] *Id.*

[68] John W. Anderson & Elsa Walsh, *Drug Sweeps Spur Debate; Effect on D.C. Businesses, Residents' Rights Questioned*, WASH. POST, Oct. 5, 1986, at B1.

[69] *See* United States v. McFayden, 865 F.2d 1306 (D.C. Cir. 1989); Galberth v. United States, 590 A.2d 990 (D.C. App. 1991).

[70] *McFayden*, 865 F.2d at 1307.

[71] 590 A.2d 990 (1991).

[72] *Id.* at 998-99.

[73] *Id.* at 999.

[74] *Id.* at 999-1000.

III. LEGAL BACKGROUND FOR STREET ENCOUNTERS AND ROADBLOCKS

A. *Street Encounters*

As previously indicated, saturation patrols usually are implemented to establish a dominant police presence in the community to deter street-level criminal activity.[75] To further this purpose, officers in saturation patrols concentrate on stopping individuals and asking them questions.[76] This police-citizen interaction may occur in three different contexts: an arrest, a stop, or a voluntary contact.[77] Since the arrest and stop are involuntary detentions of an individual, the fourth amendment is triggered by these police actions.[78]

The fourth amendment legitimizes individuals' desire for privacy, providing constitutional protection against abusive and arbitrary privacy invasions by the state.[79] However, the fourth amendment does not grant an absolute ban against privacy intrusions. Instead, individuals only have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[80] Because this clause is somewhat ambiguous, several concepts must be examined to decide what constitutes an "unreasonable search or seizure."

1. *What is a "Search?"*

The first element to define is "search." A search is a "governmental infringement of an individual's privacy."[81] To determine whether an individual's privacy has been invaded, the Supreme Court has adopted Justice Harlan's two part test from his concurrence in *Katz v. United States*.[82] First, the individual must have exhibited an actual subjective expectation of privacy.[83] Thus, "items exposed to the public, abandoned, or obtained by consent are not protected because an individual has not maintained a reasonable expectation of

---

[75] *See supra* text accompanying note 62.

[76] *Id.*

[77] *See generally* Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771 (1982).

[78] *Id.* at 802.

[79] *See* U.S. CONST. amend. IV.

[80] *Id.*

[81] *21st Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990–1991*, 80 GEO. L.J. 939, 941 (1992) [hereinafter *21st Annual Review*].

[82] 389 U.S. 347 (1967).

[83] *Id.* at 361 (Harlan, J., concurring).

privacy in those items."[84] Second, society must be prepared to recognize that expectation as objectively reasonable.[85] The Court has held that the street is a place where individuals have a reasonable expectation of privacy.[86]

2. *What is a "Seizure?"*

The second ambiguity which needs to be defined is the concept of a "seizure." Determining what consitutes a seizure has been problematic for the Supreme Court. One definition posited by the Supreme Court is that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom. . . ."[87] Another definition, suggested by Professor Richard Williamson, is any "significant restriction of movement."[88]

Regardless of the precise definition used, the Supreme Court has found that not all police-citizen contacts are "seizures."[89]As the Court indicated in *Terry v. Ohio*, "Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life."[90]

The Court went on to say in a footnote that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[91] Thus, if an individual voluntarily complies with an officer's request for information, and the officer does not restrain the individual's freedom, then the individual has not been seized.

The question thus becomes—when is an individual's freedom restrained? The footnote in *Terry* was the Supreme Court's first clue about what might constitute restraint—physical force or a show of authority. While it may be easy to decide whether someone has been detained by physical force, determining whether someone has been involuntarily detained due to a show of authority is more difficult.

In 1980, the Supreme Court provided another clue for deciding this issue. In *United States v. Mendenhall*, the defendant was approached by two plain

---

[84] *21st Annual Review*, *supra* note 81, at 942.

[85] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[86] Terry v. Ohio, 392 U.S. 1, 9 (1968).

[87] *Id.* at 16.

[88] Williamson, *supra* note 77, at 777.

[89] *See* Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

[90] 392 U.S. 1, 13 (1968).

[91] *Id.* at 19 n.16.

clothes DEA agents who suspected her of narcotics trafficking at the Detroit Metropolitan Airport.[92] After complying with the officers' request to see her driver's license and airline tickets, Mendenhall followed the officers to the airport DEA office.[93] The agents then asked if they could search her purse as well as her person. During a strip search, two small packages of heroin were located.[94]

The decision in this case appears disjointed and confusing because there was no majority opinion by the Court. Three members of the Court determined that this encounter constituted a seizure but found that the encounter was permissible because the officers had reasonable suspicion that the defendant was engaged in criminal activity.[95] Four justices argued that the encounter constituted a seizure but found that the officers lacked reasonable grounds to suspect her of criminal activity.[96] However, the most curious opinion was written by Justice Stewart, joined by Justice Rehnquist. Although the lower court had readily determined that this encounter constituted a seizure, Justice Stewart ignored this finding and first examined whether a seizure had occurred in this case.[97] His test for determining whether an individual is seized within the meaning of the fourth amendment is whether a reasonable person would have believed that he was free to leave under the circumstances.[98] If so, then there is no intrusion upon a person's liberty or privacy interests when an individual remains to answer questions.[99] Applying his test, Justice Stewart determined that there had not been a seizure because the events took place in the public concourse, the officers were in plain clothes, they displayed no weapons, and they did not summon the defendant but merely requested to see her identification and ticket.[100]

However, in a case with facts similar to *Mendenhall*, the Court found not only a seizure, but the most invasive of seizures—an arrest.[101] Although *Florida v. Royer*,[102] like *Mendenhall*, is somewhat disjointed with several opinions, a majority of the Court accepted Stewart's test for assessing restraint. Royer, much like Mendenhall, was observed by detectives at the Miami

---

92 United States v. Mendenhall, 446 U.S. 544, 547 (1980).
93 *Id.* at 548.
94 *Id.* at 549.
95 *Id.* at 560 (Powell, J., concurring).
96 *Id.* at 571–77 (White, J., dissenting).
97 *Id.* at 551.
98 *Id.* at 554.
99 *Id.*
100 *Id.* at 555.
101 Florida v. Royer, 460 U.S. 491 (1983).
102 *Id.*

International Airport where he was suspected of being a drug courier because he matched the characteristics of a "drug courier profile."[103] The detectives approached Royer, identified themselves as police officers, and asked to see Royer's airline ticket and driver's license.[104] When the name on the driver's license did not match the name on the airline ticket, the detectives asked Royer to accompany them to a room described as a "large storage closet."[105] They did not return his license or airline ticket.[106] Royer followed the detectives but did not orally respond to the detectives' questions.[107] In the room, the detectives asked to search Royer's luggage.[108] Royer produced a key but made no response to their question.[109] The search uncovered marijuana.[110]

In determining that the encounter was not voluntary, the Court focused on the fact that the detectives kept Royer's ticket, identification, and luggage as well as the fact that the detectives made no effort to tell Royer that he did not have to consent to the search.[111] The Court also found relevant the fact that Royer was moved from one location to another.[112] The plurality refused to characterize the initial encounter in which the detectives asked to see identification as a seizure.[113] The four dissenters agreed that the initial encounter did not constitute a seizure.[114] Only Justice Brennan concluded that a seizure occurred when the officers identified themselves and asked Royer for his identification and airline ticket.[115]

While the *Mendenhall-Royer* test provides some guidance for determining whether a particular encounter is a seizure, uncertainty still exists about what facts should be scrutinized when examining the surrounding circumstances. In *Mendenhall*, Justice Stewart suggested that such factors as the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, language, and tone of voice should be examined to decide whether compliance with the officer's request was compelled.[116] Professor Williamson expands several of these points, suggesting

---

[103] *Id.* at 493.
[104] *Id.* at 494.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 494–95.
[109] *Id.* at 494.
[110] *Id.* at 494–95.
[111] *Id.* at 503–04.
[112] *Id.* at 504–05.
[113] *Id.* at 498.
[114] *Id.* at 515 (Blackmun, J., dissenting); *Id.* at 523 n.3 (Rehnquist, J., dissenting).
[115] *Id.* at 511 (Brennan, J., concurring).
[116] United States v. Mendenhall, 446 U.S. 544, 555 (1980).

that display of a weapon could include putting a hand on a holstered firearm.[117] A frisk of a suspect as well as certain verbal commands such as "Stay where you are!" would also prove compulsion.[118] Other relevant factors courts have examined include the location of an encounter, the method by which an officer initiates the encounter, the nature of the questions asked, and the request to move to a different location.[119] All of these factors are reviewed in totality to determine whether an individual acted voluntarily.

However, the Supreme Court, as well as lower courts, has noted some dissatisfaction with its *Mendenhall-Royer* test. Certainly, most reasonable people will not feel free to leave when questioned by an officer. The mere psychological makeup of the interaction dictates such a result.[120] However, in two recent opinions, the Supreme Court has indicated that psychological pressure to cooperate with police officers merely because they are authority figures in American society is not what the Court means when it says that a reasonable person would not feel free to leave.[121]

In *Immigration and Naturalization Service v. Delgado*,[122] the Court found that responses of workers in a clothing factory to questions by INS agents were not compelled even though the individuals were at work and INS agents positioned themselves at the exits of the building. The Court acknowledged the psychological pressure argument but indicated that "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."[123] In fact, in this decision, the Court seems to make a definite shift in stance regarding what constitutes a seizure. This shift can best be seen in the Court's articulation of the *Mendenhall-Royer* test in which the Court notes that "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave *if he had not responded*, one cannot say that the questioning resulted in a detention under the Fourth Amendment."[124] The added language suggests that the Court is now focusing on whether the individual felt free not to respond rather than whether the individual felt unable to leave.

---

[117] Williamson, *supra* note 77, at 793.

[118] *Id.*

[119] *Id.* at 794.

[120] Professor Williamson discusses Professor Wayne LaFave's argument that any time a police officer approaches an individual, a show of authority is implicit. *Id.* at 781.

[121] Florida v. Bostick, 111 S. Ct. 2382 (1991); INS v. Delgado, 466 U.S. 210 (1984).

[122] 466 U.S. 210 (1984).

[123] *Id.* at 216.

[124] *Id.* (emphasis added).

This concept was substantiated in *Florida v. Bostick*[125] when the Court further narrowed the *Mendenhall-Royer* test. In *Florida v. Bostick*, police officers boarded a bus occupied by the defendant, questioned the defendant and other passengers, and requested permission to search defendant's luggage.[126] While this case certainly fell within the "a reasonable person would not have felt free to leave" category because most individuals would not feel free to leave a departing bus which contains their luggage, the Supreme Court upheld the constitutionality of this search.[127] The Court changed the *Mendenhall-Royer* test somewhat, noting that "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[128] Moreover, the Court emphasized that the reasonable person being contemplated is a reasonable person, innocent of any crime.[129]

With these two opinions, the Court seems to have made two significant changes. First, independent factors such as being at work or on a departing bus will not be considered when deciding whether a reasonable person would feel that he could not leave. Instead, the perceived restriction must come from police conduct. Second, the Court seems to be imposing an affirmative duty on suspects to refuse to answer an officer's questions first before a seizure will be found.

3. *What is "Unreasonable?"*

While the Supreme Court has found that not all police-citizen encounters constitute seizures, the Court has held that arrests and stops are seizures under the fourth amendment because these police practices involve restraining an individual by force or a show of authority.[130] Of course, not all arrests and stops are fourth amendment violations. The fourth amendment only protects individuals from *unreasonable* searches and seizures.[131] Thus, the next item to examine is what the Court considers an *unreasonable* seizure.

At one time, it was believed that all involuntary police encounters had to be predicated on probable cause in order to be "reasonable."[132] This notion

---

[125] 111 S. Ct. 2382 (1991).

[126] *Id.* at 2384–85.

[127] *Id.* at 2389.

[128] *Id.* at 2387.

[129] *Id.* at 2388.

[130] Williamson, *supra* note 77, at 802.

[131] U.S. CONST. amend. IV.

[132] Wayne R. LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 418 (1984).

largely emerged from the idea that police-citizen contacts were either arrests or not seizures at all.[133] However, the Supreme Court dispelled this theory in *Terry v. Ohio*[134] by acknowledging the legitimacy of the police practice of "stops."

In *Terry*, Officer McFadden observed three men pacing back and forth from a street corner to a store window, conferring at the corner upon the conclusion of each trip.[135] Relying on over thirty years of experience as a police officer, Officer McFadden suspected the men of "casing the store for a stickup," so he stopped the individuals to investigate.[136] During a brief patdown of Terry's outer clothing, he felt a suspicious bulge.[137] He then patted under Terry's coat and recovered a gun from Terry's left breast pocket.[138]

The Court decided that, under the fourth amendment, Officer McFadden had seized Terry.[139] However, the Court chose to "assume" that the seizure began when Officer McFadden searched Terry for weapons.[140] Although Officer McFadden did not have probable cause to believe that Terry had committed a crime, the Court determined that the detention was permissible by employing a balancing test for analyzing reasonableness.[141] Under this new test (which later came to be known as "reasonable suspicion"), an officer's actions would be judged by an objective standard: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[142] The Court further specified that the officer must be able to articulate specific reasons for his actions; mere inarticulable hunches that an individual seemed suspicious would not suffice.[143] Applying this test, the Court found that Officer McFadden's actions withstood constitutional scrutiny because Officer McFadden was able to give specific reasons why he thought Terry and his cohorts were about to commit a robbery.[144]

---

[133] *Id.*
[134] 392 U.S. 1 (1968).
[135] *Id.* at 5–6.
[136] *Id.* at 6–7.
[137] *Id.* at 7.
[138] *Id.*
[139] *Id.* at 19.
[140] *Id.* at 19 n.16.
[141] *Id.* at 22–24.
[142] *Id.* at 21–22.
[143] *Id.* at 22.
[144] *Id.* at 27–31.

The Court in *Terry* also used this new test when it decided that Officer McFadden's protective search for weapons was constitutional.[145] Finding that Officer McFadden had reason to suspect that Terry and his accomplices might be armed and dangerous, the Court decided that a limited patdown for weapons was reasonable.[146] However, the Court specified that this search had to be limited to the discovery of weapons which might harm the officer or nearby citizens.[147] Because Officer McFadden only searched under Terry's coat after he felt an object which might be a gun, the Court found that the search had been sufficiently limited to the discovery of weapons.[148]

With its opinion in *Terry*, the Supreme Court constitutionally recognized the police "stop" and announced a new standard for judging these contacts.[149] However, *Terry* was ambiguous on certain points and needed to be clarified by later decisions. One area of confusion concerned the constitutionality of *pre*-search nonarrest detentions. By "assuming" that Terry's seizure began at the point of the search, the Court ignored the issue concerning the level of suspicion constitutionally necessary to engage in pre-search detentions. The Supreme Court answered this question in *Adams v. Williams*[150] when it made two assumptions. First, the Court assumed that the validity of a weapons search depended upon the validity of the stop prior to the search.[151] Second, the Court assumed that pre-search stops predicated on less than probable cause could be constitutional.[152] Ironically, the Court came to this conclusion by reformulating *Terry*. Quoting *Terry*, the Court emphasized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."[153]

Although the Supreme Court in *Terry* specifically reserved making a decision about the constitutionality of pre-search detentions,[154] the *Adams* Court interpreted this language to mean that pre-search detentions predicated on less than probable cause are constitutionally permissible.[155] The Court went on to approve a reasonable suspicion standard for such detentions when it

---

145 *Id.*
146 *Id.* at 30.
147 *Id.* at 26.
148 *Id.* at 29–30.
149 *Id.* at 19–20.
150 407 U.S. 143 (1972).
151 *Id.* at 145.
152 *Id.* at 146.
153 *Id.* at 145 (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).
154 *Terry*, 392 U.S. at 19 n.16.
155 Adams v. Williams, 407 U.S. 143, 145–46 (1972).

announced that "[A] brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information, *may be most reasonable in light of the facts known to the officer at the time.*"[156] Thus, this opinion brought all involuntary non-arrest detentions under the same standard. Before an officer may involuntarily detain an individual, even to ask questions, the officer must be able to articulate specific reasons for "stopping" the individual.

Another unresolved point concerned the type of circumstances which constitute reasonable suspicion. Although the Court emphasized that inarticulable hunches were insufficient, it failed to adequately address which type of facts would fall into the hunch category and which type would fall into the reasonable suspicion category. The case of *Brown v. Texas*[157] provides some assistance in this area. In *Brown*, the Court determined that officers lacked reasonable suspicion to stop Brown merely because he was in a high drug traffic area and the situation in the alley in which he and another individual were located "looked suspicious."[158] The officers felt that the situation "looked suspicious" because the two individuals in the alley appeared to be together but walked away from each other once they saw the officers.[159] The Court emphasized that these facts failed to demonstrate that Brown's activities were any different from other individuals in the neighborhood.[160] Thus, singling out Brown was impermissible.

Essentially, this opinion indicates that officers must point to specific, objective facts about why a particular individual's actions seem suspicious. Officers cannot rely solely on facts about the area in which the suspicious actions are taking place in order to establish reasonable suspicion.

The permissible scope of searches incident to a stop have also been examined since *Terry*. The Court in *Terry* announced that protective searches for weapons are permissible, but only if the officer reasonably suspects that the individual is armed and dangerous, and the search is limited to discovering weapons.[161] This point was driven home in *Sibron v. New York* when the Court found an officer's search unconstitutional.[162] In *Sibron*, the officer ordered Sibron out of a restaurant and told him: "You know what I am after."[163] When Sibron reached into his pocket, the officer also reached into

---

156 *Id.* at 146 (emphasis added).
157 443 U.S. 47 (1979).
158 *Brown*, 443 U.S. at 48, 52.
159 *Id.* at 48.
160 *Id.* at 52.
161 Terry v. Ohio, 392 U.S. 1, 24–26 (1968).
162 Sibron v. New York, 392 U.S. 40, 65 (1968).
163 *Id.* at 45.

the pocket and recovered several envelopes containing heroin. The Court determined for other reasons that the seizure was impermissible, but it also noted that even if the seizure had been constitutional, the officer's search of Sibron was impermissible because the search was not reasonably limited in scope.[164] Unlike Officer McFadden in *Terry*, this officer made no attempt to do a limited exploratory search for weapons. Instead, he reached into the pocket where he expected to find narcotics.[165]

Finally, questions also have emerged since *Terry* regarding the permissible duration of a stop. Like the scope of a search incident to a stop, the length of time to effectuate a stop must also be reasonable.[166] The Supreme Court has refused to set a rigid time limit on how long is reasonable;[167] however, the Court noted in *United States v. Place* that it has never approved a seizure of the person for as long as ninety minutes.[168] On the other hand, the Court determined in *United States v. Sharpe* that twenty minutes is not necessarily too long for a stop.[169] In assessing whether the duration of the stop was too long in *Sharpe*, the Court focused on whether the police "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."[170]

To summarize, a stop is considered a less intrusive privacy invasion than an arrest, so stops must only be predicated on "reasonable suspicion."[171] To meet this standard, an officer must reasonably suspect that the individual is committing or is about to commit a crime.[172] The reasonableness of the stop will be judged by an objective standard—the facts available to the officer must convince a reasonable person that the action was appropriate.[173] The officer must be able to articulate specific reasons why the individual seemed suspicious; mere inarticulable hunches will not be deemed sufficient.[174] Once a stop has been effected, the officer may do a limited protective search for weapons when there is reason to suspect that the individual is armed and

---

[164] *Id.* at 65.

[165] *Id.* at 45.

[166] 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 9.2(f), at 374 (2d ed. 1987).

[167] *See* United States v. Sharpe, 470 U.S. 675, 685 (1985).

[168] United States v. Place, 462 U.S. 696, 709–10 (1983).

[169] *Sharpe*, 470 U.S. at 686–88.

[170] *Id.* at 686.

[171] Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

[172] *Id.*

[173] *Id.*

[174] *Id.* at 22.

dangerous.[175] However, the scope of this search must be confined to the discovery of weapons which may be used to assault the officer or nearby citizens.[176] Finally, stops must be conducted within a reasonable amount of time.[177]

The final police-citizen contact which can occur during street encounters is also the most intrusive: the arrest. To be deemed an arrest, a police-citizen contact need not be limited to situations in which an officer informs a suspect that he is "under arrest" and takes the individual to the station house.[178] Instead, the Supreme Court focuses on the level of intrusion.[179] Factors which the Court has examined when assessing whether a contact constitutes an arrest include the degree of force used or displayed to effectuate the contact, statements made by the officer, the duration of the contact, and the location of the contact.[180] Essentially, the Court examines these factors and if the particular police action goes beyond the limited purposes of a "stop," the Court finds that the encounter was an arrest.[181] Thus, as Professor Williamson aptly points out, "'[a]rrest'. . . becomes a term of art describing all seizures that include an intrusion on personal liberty greater than that conferred under the authority of a stop."[182]

For an arrest to be considered a reasonable seizure, the arrest must be predicated on probable cause.[183] As the Court noted in *Henry v. United States*, "probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that an offense has been committed."[184] As it does in determining reasonable suspicion, the Court uses an objective standard for assessing probable cause—would a reasonable person believe that the suspect has committed or is committing a crime?[185]

The Supreme Court has also approached defining probable cause like reasonable suspicion in that the Court has employed a variable test.[186] In other words, the Court examines the facts of each case, rather than establishing narrow legal rules for every situation. As the Supreme Court pointed out in

---

[175] *Id.* at 24–26.
[176] *Id.* at 25–26.
[177] 3 LAFAVE, *supra* note 166, at 374.
[178] Williamson, *supra* note 77, at 804.
[179] *See generally* LaFave, *supra* note 132; Williamson, *supra* note 77.
[180] LaFave, *supra* note 132; Williamson, *supra* note 77.
[181] LaFave, *supra* note 132; Williamson, *supra* note 77.
[182] Williamson, *supra* note 77, at 805.
[183] 1 LAFAVE, *supra* note 166, § 3.1(a), at 543.
[184] Henry v. United States, 361 U.S. 98, 102 (1959).
[185] Carroll v. United States, 267 U.S. 132, 162 (1925).
[186] 1 LAFAVE, *supra* note 166, § 3.2(a), at 558.

Illinois v. Gates, "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[187]

However, one of the problems with using a variable test is in determining what amount of suspicion rises to the level of probable cause. Commentators agree that probable cause lies somewhere between reasonable suspicion and guilt beyond a reasonable doubt.[188] However, the lines between these standards have become increasingly difficult to discern, especially between reasonable suspicion and probable cause, because the Supreme Court has seemed to construe probable cause more leniently in the last decade.[189]

In any case, once an officer has made a valid custodial arrest (an arrest in which the officer will be taking the suspect into custody), even if the arrest is for a minor violation such as driving without a license,[190] the officer may do a search incident to arrest.[191] Unlike the limitations of the "stop and frisk" search, an officer may search an arrested individual in order to discover weapons *or* evidence.[192] The policy behind allowing officers to search the individual for evidence is to prevent the individual from concealing or destroying evidence.[193]

However, while officers are granted more latitude in a search incident to arrest, these searches must be limited to the person and the area within the immediate control of the person.[194] The Supreme Court has held that search of an entire premises as a search incident to arrest is impermissible.[195] On the other hand, the Court has found that searching the entire passenger side of an automobile as a search incident to arrest is permissible.[196]

Although a search incident to arrest grants officers broader investigative powers, it is important to remember that officers can conduct a search incident to arrest only after they have made a *valid* custodial arrest.[197] Officers are not permitted to search incident to arrest based on a pretextual arrest.[198] A

---

[187] Illinois v. Gates, 462 U.S. 213, 232 (1983).

[188] 1 LAFAVE, *supra* note 166, § 3.2(d), at 586.

[189] *See generally* LaFave, *supra* note 132; Williamson, *supra* note 77.

[190] *See* United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

[191] Chimel v. California, 395 U.S. 752, 762–63 (1969).

[192] *Id.* at 763.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *See* New York v. Belton, 453 U.S. 454 (1981).

[197] *See* John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 523 (1984).

[198] *Id.*

pretextual arrest occurs when the police use an arrest based on probable cause as a means to investigate or search for evidence for an offense for which they do not have probable cause.[199] When a search is incident to a pretextual arrest, the search is unconstitutional.[200]

The Supreme Court first articulated that pretextual arrests are constitutionally impermissible in *United States v. Lefkowitz*[201] when it announced that "[a]n arrest may not be used as a pretext to search for evidence."[202] Like other seizure issues, the Court applies an objective test for determining whether an officer arrested an individual as a pretext for conducting a search rather than examining the subjective intentions of the officer.[203] The test then centers on whether an officer's actions were reasonable in light of the surrounding circumstances.[204]

B. *Roadblocks*

Police departments also use roadblocks to establish a dominant police presence and deter criminal activity.[205] Roadblocks have been employed to deter various activities: drug trafficking,[206] gang violence,[207] drunk-driving,[208] and the importation of illegal aliens.[209]

Because roadblocks are temporary, involuntary detentions of individuals driving motor vehicles, roadblocks are seizures.[210] In most situations, police officers do not have individualized suspicion that the occupants in each car that they stop are committing a crime.[211] However, the Supreme Court has determined that some types of roadblocks do not require reasonable suspicion.[212] The Court has come to this conclusion by employing a balancing test for traffic encounters in which the Court weighs: 1) the seriousness of the

---

[199] United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989).

[200] Burkoff, *supra* note 197, at 523.

[201] 285 U.S. 452, 467 (1932).

[202] *Id.*

[203] Scott v. United States, 436 U.S. 128, 138 (1978).

[204] *Id.*

[205] Ex. 1 Cr. No. 86-0331, Galberth v. United States, 590 A.2d 990 (D.C. App. 1991).

[206] *Id.*

[207] Holguin, *supra* note 52.

[208] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

[209] United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[210] *Id.* at 556.

[211] *See Sitz*, 496 U.S. at 456 (Brennan, J., dissenting); *Martinez-Fuerte*, 428 U.S. at 545.

[212] *Sitz*, 496 U.S. at 455; *Martinez-Fuerte*, 428 U.S. at 556.

public interest served by the seizure; 2) the degree to which the seizure advances that public interest; and 3) the severity of the interference with individual liberty.[213]

Using such a test, the Supreme Court first articulated in *United States v. Martinez-Fuerte* that some roadblocks require less than reasonable suspicion in order to be considered reasonable under the fourth amendment.[214] The *Martinez-Fuerte* case involved a fixed border patrol checkpoint in which all vehicles on a major highway near the border were briefly detained to determine whether any illegal aliens were being transported.[215] The Court found that preventing the illegal importation of aliens was an important state goal.[216] The Court then focused on the impracticality of requiring reasonable suspicion in such situations.[217] Not only would a reasonable suspicion requirement for each car stopped be impractical due to a heavy flow of traffic, but such a requirement would also eliminate the goal of preventing illegal aliens from entering the country.[218] Because most stops lasted only a few minutes, the Court determined that the governmental interest in keeping illegal aliens out of the country outweighed the minimal intrusion on privacy.[219]

However, in contrast, *United States v. Brignoni-Ponce*,[220] a border patrol case decided just one year prior to *Martinez-Fuerte*, held that officers on *roving* patrol must have reasonable suspicion to stop a vehicle. As in *Martinez-Fuerte*, the Court noted that the government has a significant interest in detecting illegal aliens.[221] Moreover, the state presented evidence that the length of each stop was only a few minutes.[222] However, for the Court, the significant difference between these two cases seems to be the fact that roving patrols allowed "broad and unlimited discretion" on the part of patrol officers.[223]

This concern over unlimited officer discretion also seemed to impact the decision of *Delaware v. Prouse*.[224] In *Prouse*, an officer randomly stopped the driver of a car to check his license and registration without any reasonable

---

213 Brown v. Texas, 443 U.S. 47, 50–51 (1979) (Although *Brown* involves a street encounter, the balancing test used in this case has generally been used to judge traffic encounters also.).

214 *Martinez-Fuerte*, 428 U.S. at 561–62.

215 *Id.* at 545–47.

216 *Id.* at 556–57.

217 *Id.* at 557.

218 *Id.*

219 *Id.* at 557–58.

220 422 U.S. 873 (1975).

221 *Id.* at 878.

222 *Id.* at 880.

223 *Id.* at 882.

224 440 U.S. 648 (1979).

suspicion that the driver was engaged in criminal activity.[225] Balancing the intrusion of the driver's privacy against the government's interest in promoting safety on the state's roads, the Court held that the traffic stop violated the fourth amendment.[226] Because random spot checks are likely to concern or frighten drivers, while only marginally contributing to highway safety, the Court determined that the state's interest did not outweigh the privacy intrusion.[227]

However, *Prouse* is almost as significant for its dicta as for its holding. Writing for the majority, Justice White noted that the holding of *Delaware v. Prouse* "does not preclude the State of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative."[228]

Thus, the Supreme Court has made a clear distinction between systematized state-run roadblocks and random traffic stops. Because the latter are subject to broad discretion, the Court has found that the individual's privacy interest outweighs governmental interests.

Even if a roadblock effectively curbs discretion on the part of individual officers, prior to *Michigan Department of State Police v. Sitz*,[229] there was some question as to how effective a roadblock had to be in advancing the state's interest. For example, one of the reasons the Court deemed the officer's conduct in *Prouse* unconstitutional was the fact that random spot checks were unlikely to have much impact on highway safety.[230] The recent *Sitz* case, however, suggests that states need show only a minimal correlation between the state's means and goal in order to be considered "reasonable."[231]

In *Sitz*, the police established a sobriety checkpoint program based on guidelines from a Sobriety Checkpoint Advisory Committee governing the operation of the checkpoint, site selection, and publicity.[232] On average, each vehicle stopped as part of the checkpoint was detained for twenty-five seconds.[233] Of the 126 vehicles that were stopped, two drivers were arrested for driving under the influence of alcohol.[234]

---

225 *Id.* at 650–51.
226 *Id.* at 653–55.
227 *Id.* at 656–59.
228 *Id.* at 663.
229 496 U.S. 444 (1990).
230 *Prouse*, 440 U.S. at 660.
231 *Sitz*, 496 U.S. at 453–55.
232 *Id.* at 447.
233 *Id.* at 448.
234 *Id.*

In deciding that these checkpoints were constitutional, the Court found that deterring drunk-driving is an important state interest while the interference with individual liberty is minimal because most drivers were only delayed for an average of twenty-five seconds.[235] Finally, the Court determined that the seizure effectively advanced the government's interest even though only 1.5% of the drivers who passed through the Michigan checkpoint were arrested for drunk-driving.[236] The Court emphasized that the effectiveness component of the balancing test "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."[237] Thus, as long as a state presents some evidence of effectiveness, the Court has noted a willingness to defer to the state's judgment.

IV. CONSTITUTIONAL ISSUES ARISING FROM SATURATION PATROLS AND ROADBLOCKS

Although the Supreme Court has dealt extensively with constitutional issues involving street encounters and roadblocks, new questions emerge with the increasing use of saturation patrols and roadblocks. Two factors may account for this wave of constitutional questions. First, publicity, the greatest asset of these programs, is also their greatest weakness because watch-dog groups can easily monitor these programs for constitutional errors. Second, the ambiguous standards and fact-specific approaches which the Supreme Court has used to analyze seizure issues has provided little guidance for police officials implementing innovative programs. This section examines several constitutional issues arising from these programs, focusing particularly on the voluntary contact/seizure distinction, the stop/arrest distinction, and the balancing test for roadblocks.

A. *Voluntary Contact or Seizure?*

The Supreme Court's treatment of the distinction between voluntary police-citizen contacts and seizures is one area presenting constitutional confusion in conjunction with these programs. Lower courts have been perplexed with deciding seizure issues using the *Mendenhall-Royer* "free to leave" test.[238]

---

[235] *Id.* at 453–55.
[236] *Id.* at 454–55.
[237] *Id.* at 453–54.
[238] *See supra* notes 116–29 and accompanying text.

Inconsistency seems to result as certain fact scenerios result in seizures in some lower courts and voluntary contact in other lower courts.

Moreover, the Supreme Court's new "free to decline" test announced in *Florida v. Bostick* does not appear to adequately clear up these inconsistencies.[239] Lower courts are still left asking "when is an individual free to decline an officer's requests?" Professor William LaFave suggests that a better approach for assessing voluntary contact/seizure questions is to examine the police officer's conduct in terms of whether the police officer, even if making inquiries a private citizen would not, has otherwise behaved in a manner which would be perceived as an inoffensive contact if it occurred between two ordinary citizens.[240] Arguably, the Supreme Court implicitly is already applying such a test; however, because the Court's current explicit language is ambiguous, as well as the fact that the application of these tests is quite fact specific, lower courts are left confused.

This confusion can be problematic for attorneys wishing to challenge the constitutionality of aggressive policing tactics and for police administrators wishing to create constitutional programs. Clearly, there are certain situations in which the Supreme Court's tests are easy to apply. For instance, one newspaper account of a sweep in Operation Clean Sweep indicated that twenty people had to line up while police officers searched each individual's pockets and checked each person's identification.[241] Most, if not all courts, would indicate that this practice constitutes a seizure. After all, even under the stricter *Bostick* test, most individuals would not feel free to decline an officer's requests in this situation.

However, most scenarios fall into a much more gray area. For example, consider the ACLU's version of an A.C.E. offensive in which citizens are approached by several officers and asked to state their names, produce identifications, and explain their presence in the area.[242] On the one hand, there are reasons for characterizing this contact as a seizure. First, by applying the literal language in the plurality's opinion in *Mendenhall*, a reasonable person is likely to feel that he cannot leave when several uniformed officers approach him at the same time, and there is a substantial, visible police presence in the rest of the neighborhood. As Professor Tracey Maclin observed, officers using aggressive patrol tactics are "engaged in serious business. These are not casual encounters; officers are armed and have a mission."[243] Second, in determining

---

[239] *See supra* notes 125–29 and accompanying text.

[240] LaFave, *supra* note 132, at 424–25.

[241] *See* Anderson & Walsh, *supra* note 68.

[242] *See* Glass v. City of Columbus, No. C2-91-775 (S.D. Ohio, filed Sept. 20, 1991).

[243] Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 808 (1992).

whether a police-citizen encounter constitutes a seizure, Justice Stewart cited tone and language as relevant factors.[244] It could be argued that the question "what are you doing in the neighborhood?" is accusatory and almost commands a response on the part of a citizen.

On the other hand, there are several reasons for labeling this contact as voluntary. First, the presence of several officers is not alone enough reason to infer involuntariness.[245] In *United States v. Dunson*,[246] the Sixth Circuit determined that the defendant's consent to search his vehicle was voluntary even though three officers were present in three separate police cars. The Court of Appeals admitted that this situation might have an unsettling effect on anyone carrying a large quantity of drugs, but emphasized that the reasonable person test contemplates a reasonable person innocent of any crime.[247]

Second, these encounters occur in a public place—the street. Lower courts, as well as the Supreme Court, have indicated that individuals are less likely to be subjected to undue police influence in public areas where persons other than law enforcement officers can view the police practices.[248]

Third, the officers in these encounters are merely asking for some identification, a practice which the Supreme Court has said does not, by itself, make an encounter a stop.[249] Moreover, while an officer's language or tone requesting this information *might* be construed as accusatory, these are only two of the factors to be considered when deciding whether an encounter constitutes a seizure. Display of a weapon or some physical touching of the citizen, factors which more clearly communicate to an individual that he is not free to leave, often do not occur in these situations. One could argue that a more definite showing of force or authority, other than a strong tone of voice or harsh language, is needed to establish compulsion.

Finally, the Supreme Court, as well as lower courts, increasingly seems to place an affirmative duty on the individual to first decline the officer's requests.[250] At the very least, courts seem more sympathetic to a defendant's objection that he was unduly influenced by an officer when the individual first

---

244 *See supra* note 114 and accompanying text.

245 *See, e.g.*, INS v. Delgado, 466 U.S. 210 (1984).

246 940 F.2d 989, 994 (6th Cir. 1991).

247 *Id.*

248 *See* Williamson, *supra* note 77, at 794.

249 *Delgado*, 466 U.S. 210.

250 *See* Florida v. Bostick, 111 S. Ct. 2382 (1991); United States v. Wilson, 953 F.2d 116 (4th Cir. 1991); Peterson v. City of Plymouth, 945 F.2d 1416 (8th Cir. 1991); United States v. Locklin, 943 F.2d 838 (8th Cir. 1991).

attempted to terminate the contact.[251] When the officer continues to question the individual or follow him after the individual has attempted to disengage contact, courts find that a seizure has occurred.[252]

Unfortunately, most fact patterns do not involve a situation in which the individual informs the police officer that he does not want to answer questions. Thus, courts are left to determine whether the individual felt free to decline by balancing the above arguments. Moreover, one fact may change an entire analysis. For instance, although a court might decide that no seizure occurs from a mere request for identification, the court may find a seizure when an individual's identification is taken for over twenty minutes in order to conduct a warrant check. Thus, courts are left with a case-by-case analysis which leaves attorneys as well as police administrators frustrated.

B. *Arrest or Stop?*

The blurry distinction between arrests and stops presents another constitutional problem for these programs. This distinction becomes particularly important with saturation patrols because officers will be afforded more powers if a particular encounter is deemed an arrest. On the other hand, this label also may be to an officer's detriment since an officer may have a sufficient level of suspicion to effect a stop but not an arrest. Two areas specifically emphasize the problems with an ambiguous arrest/stop distinction: detaining individuals for minor violations and checking for outstanding warrants.

1. *Minor Violations*

Strict enforcement of minor traffic and criminal offenses is the heart of the saturation patrol. By stringently enforcing these laws, officers hope to deter individuals who are interested in buying/selling drugs or engaging in gang activity from the area.[253] However, the use of minor violations as a predicate for stopping individuals to check to see if they are carrying drugs or have any outstanding warrants may pose problems depending on whether the seizure is defined as a stop or an arrest.

---

[251] *See* Peterson v. City of Plymouth, 945 F.2d 1416 (8th Cir. 1991); United States v. Wilson, 953 F.2d 116 (4th Cir. 1991).

[252] Peterson v. City of Plymouth, 945 F.2d 1416 (8th Cir. 1991); United States v. Wilson, 953 F.2d 116 (4th Cir. 1991).

[253] *See* Columbus City Police Dep't, *supra* note 6.

Typically, the scenario arises as follows: officers detain an individual, conduct a full search, run a warrant check, and then cite the individual at the end of the contact for a minor offense such as jaywalking.[254] Three questions need to be asked regarding these contacts. First, should a detention for a citable minor violation be considered an arrest, and if so, should a search incident to the arrest be allowed? Second, if it can be considered an arrest, at what point has such a detention become an arrest? Third, if the contact is considered an arrest from the initial detention, is it pretextual?

Regarding the first question, some commentators suggest that investigatory detentions should be limited to serious offenses.[255] Two rationales are given for this suggestion. First, if an offense is minor, then the social interest in detecting and deterring the activity is also minor.[256] Thus, searching an individual and detaining him for an extended amount of time may be excessive and unreasonable.[257] Second, minor offenses are of such a nature that officers might abuse their discretion if they are allowed to further investigate an individual based on such an offense.[258]

In addition, many jurisdictions have statutes limiting officers to issuing citations for minor violations rather than permitting arrest and transport to the station house.[259] In these jurisdictions, it seems unreasonable to allow officers to frisk the suspect because the purposes of the search incident to arrest are not furthered. If the officer issues a citation, the officer's safety concerns are less pronounced than if the officer places the individual in the back of the squad car and takes the individual to the station house. Moreover, the officer need not be concerned about the destruction of evidence because minor violations usually do not involve physical evidence. Acknowledging these problems, lower courts in jurisdictions containing such statutes generally have suppressed evidence obtained incident to an arrest for a minor violation.[260]

---

254 *See generally* Glass v. City of Columbus, No. C2-91-775 (S.D. Ohio, filed Sept. 20, 1991).

255 George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 871–72; LaFave, *supra* note 132, at 441–42.

256 Dix, *supra* note 255, at 871.

257 *Id.*

258 *Id.*; LaFave, *supra* note 132, at 441.

259 *See, e.g.*, OHIO REV. CODE ANN. § 2935.36(A) (Anderson 1991) ("Notwithstanding any other provision of the Revised Code, when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation . . . .").

260 LaFave, *supra* note 132, at 442.

Some lower courts have allowed frisks of suspects incident to a temporary detention while a citation is being prepared.[261] However, in these situations, there is usually some reason to believe that the individual might be armed and dangerous. For instance, the individual makes a sudden move to a place where a weapon might be located, fails to respond to the officer's request to remove his hands from pockets, or the individual has a suspicious bulge in his clothing resembling a weapon.[262]

Assuming that detentions for minor violations can be considered arrests and that searches incident to these temporary arrests are permissible, then the next question is at what point has such a detention become an arrest? If the individual is arrested from the moment the individual is detained, then presumably the above scenerio is constitutional because the officers are merely conducting a search incident to arrest. However, if the individual is only "stopped" until the officers can gain further evidence to determine whether a citation should be issued, then the search may be considered unreasonable under the fourth amendment.

An argument for treating this practice as a stop is that because the officer has not told the suspect that he is being cited for a minor violation, appearances indicate that the officer is merely accumulating more information to determine whether a violation has in fact occurred (for example, the officer may want to make sure that the proper car was stopped or that the tail light is inoperable).

In addition, this situation is unlike *Gustafson v. Florida*[263] and *United States v. Robinson*,[264] cases which held that officers may conduct a search incident to arrest even for violations such as driving without a license. In both *Gustafson* and *Robinson*, the suspects were told that they were "under arrest" before a search of their car or person was made.[265] Because suspects stopped under these programs often are not told why they are being detained until the end of the encounter, this situation seems more like *Terry* than *Gustafson* and *Robinson*. To the suspect, the officer appears to be gathering information without any specific purpose.

Finally, by allowing officers to use minor violations as a way to detain and search individuals for drugs or firearms, courts may be endorsing a dangerous trend. Because many minor violations are difficult to disprove, officers may be encouraged to create illusory minor violations in order to stop individuals so that they can be searched.

---

[261] 3 LAFAVE, *supra* note 166, § 9.4(a), at 509.

[262] *Id.*

[263] 414 U.S. 260 (1973).

[264] 414 U.S. 218 (1973).

[265] *Gustafson*, 414 U.S. at 262; *Robinson*, 414 U.S. at 220.

However, there is an argument that this type of contact is an arrest. After all, as discussed above, an individual does not have to be told that he is "under arrest" for an arrest to be effectuated.[266] Instead, the circumstances can denote an arrest.

Also, officers often do not need to verify any facts in order to issue a citation for a minor violation. For example, if an officer has directly viewed a suspect jaywalk, the officer already has sufficient probable cause to cite the individual. Once an officer has made this determination (arrest), then the officer may permissibly search the individual incident to the arrest.

Finally, police officers always have the opportunity to fabricate offenses in order to detain individuals. This practice can occur with or without minor violations. In fact, if an officer wants to stop an individual for possessing drugs, the officer simply can lie and say that a baggie which appeared to contain drugs was hanging from the suspect's pocket.

Assuming that the officer has made an arrest from the initial contact, the final question to ask is whether this arrest was pretextual. This question is problematic in the context of minor violations for two reasons. First, as Professor LaFave indicates, minor offenses are so pervasive that officers usually can stop an individual for some minor offense as a pretext in order to investigate another offense for which officers do not have reasonable suspicion.[267] Second, even in those jurisdictions that do not have statutes mandating that officers cite individuals for minor offenses, many police departments have implicit policies that officers only should issue citations for minor offenses rather than arrest individuals and take them into custody.[268]

Two approaches have been suggested for dealing with officers arresting individuals for minor violations in order to investigate other possible criminal activity. Professor LaFave suggests that courts should examine deviations from usual police practices.[269] Thus, if the usual practice in a police department is to issue citations for minor offenses, and an officer unreasonably arrests an individual for a minor offense, then the arrest will be considered pretextual and the subsequent search incident to arrest will be deemed impermissible. Several lower courts have accepted LaFave's approach.[270] The other approach used by

---

[266] *See supra* subpart III.A.3. and accompanying notes.

[267] Burkoff, *supra* note 197, at 532 (citing 1 LAFAVE, *supra* note 166, § 1.2, at 32).

[268] *See, e.g.*, Taglavore v. United States, 291 F.2d 262, 265 (9th Cir. 1961).

[269] Burkoff, *supra* note 197, at 527–28 (citing 1 LAFAVE, *supra* note 166, § 1.2, at 33).

[270] *See* United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988); United States v. Bates, 840 F.2d 858, 860 (11th Cir. 1988) (proper inquiry is whether a reasonable officer *would* have made the arrest absent improper motivation); United States v. Causey, 818 F.2d

some lower courts looks at whether: 1) the officer has probable cause that the individual committed the minor traffic violation; and 2) the arresting officer was authorized by the state to effect a custodial arrest for the particular offense.[271] Under this approach, the usual police practices in the area are not considered.

Because this issue has not been decided by the Supreme Court, police administrators and attorneys have to be aware of the position of courts in their jurisdiction when making policy decisions about police programs. At this point, courts seem to be favoring the second approach.[272]

2. *Warrant Checks*

The stop/arrest distinction also presents problems in the warrant check context. If an individual is under arrest when the officer conducts a warrant check, then the officer is given more latitude as to the length of time expended during the detention. However, if an individual is being "stopped," then he may only be detained for a reasonable amount of time.

According to the ACLU in Columbus, individuals who were stopped as part of Operation A.C.E. had to wait for thirty minutes while the police conducted warrant checks.[273] If an individual is only "stopped" while the warrant check is being conducted, there may be reason to be concerned about the length of this detention.

However, these warrant checks are only ten minutes longer than the twenty minute stop which the Supreme Court found reasonable in *United States v. Sharpe*.[274] Moreover, the Court has refused to set a time limit for stops; instead, the Court has focused on whether the officers were pursuing a legitimate investigative technique for confirming or dispelling their suspicions.[275] On the other hand, the Court's comments in *United States v. Place*[276] that it has never approved a ninety minute stop suggest that lengthier detentions will be scrutinized carefully.

---

354 (5th Cir. 1987), *rev'd en banc*, 834 F.2d 1179 (5th Cir. 1987); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1991).

[271] *See* United States v. Cummins, 920 F.2d 498 (8th Cir. 1990); United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989); United States v. Basey, 816 F.2d 980 (5th Cir. 1987).

[272] As the court in *Cummins* points out, only the Tenth and Eleventh Circuits continue to hold to the more lenient standard. *Cummins*, 920 F.2d at 501.

[273] Glass v. City of Columbus, No. C2-91-775, 10–15 (S.D. Ohio, filed Sept. 20, 1991).

[274] 470 U.S. 675 (1985).

[275] *Id.* at 685.

[276] 462 U.S. 696 (1982).

Thus, the question becomes—is conducting a warrant check a legitimate investigative technique for confirming or dispelling suspicions? The answer to this question may depend on: 1) the type of offense for which the individual is being detained; and 2) the reason for conducting the warrant check.

To some extent, lower courts have looked at the severity of the crime for which the individual is being detained in deciding the reasonableness of conducting a warrant check.[277] For instance, the Ninth Circuit held that detaining an individual stopped for jaywalking in order to run a warrant check violates the fourth amendment if there is no reason to suspect that the individual has outstanding warrants.[278] Examining the severity of the suspected offense makes some sense because the Court noted in *Terry v. Ohio* that seizures must be reasonable given the circumstances.[279] When an individual detained is suspected of serious criminal activity, as in *United States v. Sharpe*,[280] then a warrant check may confirm the officer's suspicion that the individual is dangerous. A thirty minute warrant check for a suspected jaywalker seems to push the concept of reasonableness to the extreme.

However, some lower courts have found that conducting a warrant check is permissible even if the individual is only stopped for a minor violation when the individual gives the officer some reason to believe that the individual may have outstanding warrants.[281] For instance, if the individual takes evasive action during the course of the stop, then the officer may have reason to suspect that the individual has outstanding warrants.

Contrary to the above stated position of some lower courts, other lower courts regularly allow police officers to run warrant checks with little concern about the time required to conduct these checks.[282] After all, this police practice is considered routine in many jurisdictions. Moreover, if police

---

[277] *See* United States v. Luckett, 484 F.2d 89 (9th Cir. 1973) (warrant check of jaywalker impermissible); *cf.* People v. McGaughran, 585 P.2d 206 (Cal. 1978) (warrant check on individual stopped for traffic violation proper only if individual gives officer reason to suspect that the individual may have outstanding warrants), *rev'd on reh'g*, 601 P.2d 207 (Cal. 1979) (changed rule so that officer could conduct warrant check if the check could be conducted within the same time period to examine driver's license and registration); People v. Ellis, 446 N.E.2d 1282 (Ill. App. Ct. 1983) (warrant check of burglary suspect permissible); State v. McFarland, 446 N.E.2d 1168 (Ohio 1982) (permissible to do warrant check of individual suspected of drug sales); State v. Swaite, 656 P.2d 520 (Wash. 1982) (record check of burglary suspect permissible).

[278] *Luckett*, 484 F.2d at 90–91.

[279] Terry v. Ohio, 392 U.S. 1, 19–20 (1968).

[280] 470 U.S. 675 (1985) (individual suspected of narcotics trafficking).

[281] *See Luckett*, 484 F.2d at 91.

[282] *See, e.g.*, State v. Hewey, 471 A.2d 236 (Vt. 1983).

officers are unable to conduct warrant checks for minor traffic violations, then many individuals with outstanding warrants will escape detection altogether.

C. *General Deterrence Roadblocks*

Although roadblocks share some of the same constitutional problems as other street encounters, the most significant unresolved constitutional dilemma concerning roadblocks is the effectiveness prong of the balancing test. Under the balancing test, the seriousness of the public interest served by the roadblock and the degree to which the roadblock advances the public interest will be weighed against the severity of the roadblock's interference with individual liberty.[283] The problem for lower courts is determining how effective a roadblock has to be to advance the public interest. The depth of this problem is illustrated in two cases from Washington, D.C.

In April, 1991, Operation Clean Sweep met with a crushing blow when the District of Columbia Court of Appeals found that the roadblocks implemented as part of the program were unconstitutional.[284] In *Galberth v. United States*, the court determined that the department's general deterrence rationale for the roadblock, that it would deter drug traffic and violence associated with drugs, did not outweigh the liberty interests of individuals.[285] Unlike the fixed border patrols and sobriety checkpoints which the Supreme Court has found constitutional, the roadblocks in these circumstances were not effective enough for their stated purposes.[286]

At the other extreme is *United States v. McFayden*.[287] In *McFayden*, the United States Court of Appeals for the D.C. Circuit found that roadblocks employed in the sixth district of the city (as part of Operation Clean Sweep) were constitutional because the roadblocks served the legitimate government interest of "respond[ing] to identified problems of traffic congestion . . . improv[ing] traffic enforcement in neighborhoods experiencing serious problems . . . [and] allow[ing] police to check for a driver's license and vehicle registration. . . ."[288] The court came to this conclusion based on testimony that pedestrian drug dealers disrupt traffic by stepping into traffic to display the drugs, and buyers also disrupt traffic patterns by "stopping illegally, making U-turns or double parking in order to make drug purchases."[289]

---

[283] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
[284] Galberth v. United States, 590 A.2d 990 (D.C. App. 1991).
[285] *Id.* at 997–99.
[286] *Id.*
[287] 865 F.2d 1306 (D.C. Cir. 1989).
[288] *Id.* at 1307.
[289] *Id.* at 1308.

Essentially, both cases concern the same roadblocks. However, there are two significant differences in these cases. First, in *McFayden*, the department described the purpose of the roadblock in terms of *traffic-related* matters.[290] In contrast, the purpose of the roadblocks in *Galberth* was described as deterring drug trafficking and violence.[291] The relatedness of these items to driving or traffic matters is not readily apparent. Second, in *McFayden*, testimony was presented on how the roadblock would effect the government interest.[292] In contrast, there was no empirical evidence presented in the *Galberth* case explaining how the roadblocks would advance the state's interest.[293]

The lesson from these cases for police departments may be that police officials should carefully articulate purposes for roadblocks which can be linked to driving or traffic matters. However, police officials should be careful not to articulate goals which are merely a pretext for another purpose. For instance, police officials may run into legal troubles if they announce that the purpose of a roadblock is to check drivers' licenses and registrations when the actual purpose is to deter drug trafficking. Instead, police officials should try to link their actual purpose to a traffic-related matter as was done in *McFayden* with testimony that drug sellers and buyers were disrupting traffic patterns.

The checkpoints in Paramount may suffer from some of the same drawbacks as the roadblocks in Operation Clean Sweep because checkpoints may not be an effective way to deter gang violence. Although drunk drivers must use vehicles to commit an offense and illegal aliens must use some transportation to cross the border, gang members need not use a motor vehicle to effectuate their crimes. Thus, courts may find that these checkpoints intrude on the rights of innocent citizens without furthering the public interest of deterring gang violence. The goal, then, for Paramount may be to find a purpose which is related to traffic concerns. For instance, Paramount might want to articulate a policy in which the purpose of the checkpoints is to deter drive-by shootings associated with gang activities.

V. THE FUTURE FOR POLICE INNOVATION

A. *Short Term and Long Term Impact*

In spite of some potential constitutional problems, there are several positive aspects to these programs. First, at least in the short run, these programs are

---

290 *Id.* at 1307.

291 Galberth v. United States, 590 A.2d 990, 998-99 (D.C. App. 1991).

292 United States v. McFayden, 865 F.2d 1306, 1308 (D.C. Cir. 1989).

293 *Galberth*, 590 A.2d at 999.

very popular. Community support initially is quite strong.[294] In fact, in Columbus, residents from one neighborhood actually petitioned the police department to bring Operation A.C.E. into their neighborhood.[295] Second, in the initial phases of these programs, police morale is boosted.[296] Not only do officers find saturation patrols to be exciting, action-oriented police work, but they also feel like they are actually doing something about crime.[297]

As the programs continue, however, some negative results begin to develop. Residents become dissatisfied with the programs as they fail to live up to their lofty goals.[298] Often, these programs are unable to achieve their proposed deterrent function. Drug dealers and gang members merely continue their activities at times when the saturation patrols or roadblocks are not in operation, change their business tactics, or move their activities to new neighborhoods.[299] For example, in Washington D.C., drug dealers began dealing out of cars instead of openly selling drugs on street corners.[300] And in Los Angeles, one gang shooting occurred only hours after an Operation Hammer offensive.[301] Faced with such reports, residents, as well as police officers, feel disillusioned.

Even if community support continues to exist for these programs, they often must be abandoned due to budgetary concerns.[302] Because these programs require a substantial number of officers for a patrol unit, the city must either shift manpower and resources from other departments, hire new

---

294 *See* Catherine Candisky and Mary Stephens, *ACLU to Probe Crime Program*, COLUMBUS DISPATCH, June 25, 1991; Rae-Dupree, *supra* note 49; Mary Stephens, *Operation ACE Nets Hundreds of Arrests*, COLUMBUS DISPATCH, June 12, 1991, at B1.

295 Pereira, *supra* note 26.

296 Lovell Beaulleu & Bruce Cadwallader, *Residents See Good, Bad in Short North Roadblocks*, COLUMBUS DISPATCH, May 30, 1991, at C1.

297 *Id.*; John Ward Anderson, *'Clean Sweep' Takes Drug Effort to the Streets*, WASH. POST, Sept. 27, 1986, at B1.

298 *See, e.g.*, Wheeler & Horewitz, *supra* note 60.

299 *See, e.g.*, John H. Lee, *Sweeps Target Gangs, Drunks and 'Johns,'* L.A. TIMES, July 10, 1989, Part 2, at 6; Rick Holguin, *Officials Ready New Approach on Gangs: Checkpoints*, L.A. TIMES, Aug. 15, 1991 (Long Beach Section) Part J, at 1; Pierre Thomas, *Antidrug Sweep Judged a Sucess; Arrests Clear Streets in Georgetown South*, WASH. POST, Mar. 23, 1989 (Virginia Weekly Section) at vi; Wheeler & Horwitz, *supra* note 60.

300 Thomas, *supra* note 299.

301 Lee, *supra* note 299.

302 Wheeler & Horwitz, *supra* note 60; Daniel Klaidman, *District's 'Year of Incompetence,'* LEGAL TIMES, Dec. 19, 1988, at 18.

officers, or pay current officers for overtime work.[303] The first option may sacrifice other law enforcement areas. With the latter two situations, the city must acquire more funding to pay for these programs. Moreover, having officers work overtime may actually decrease police morale as officers burn out from working too many hours.[304]

Congested courts and overcrowded jails also stand as a barricade to the continuation of these programs. Faced with their own budgetary constraints, the court and penal systems are having trouble dealing with the increasing number of arrests generated from these programs.[305] Thus, the individual arrested today may be back on the streets in months, weeks, or even days.

B. *Alternative Approaches to Aggressive Policing*

Because programs like Operation A.C.E., Operation Hammer, Operation Clean Sweep, and the Paramount checkpoints often are plagued with practical problems as well as constitutional problems, a better approach for long-term police innovation may be community-oriented or problem-oriented policing. Community-oriented policing focuses on crime prevention rather than crime reaction by involving officers with local community groups.[306] Officers teach area residents crime prevention tactics such as neighborhood watches, conduct home security inspections, and provide residents with information about local crime.[307] Community-oriented policing seeks to change the focus of the police role in society. Instead of looking at their jobs in "we-they" terms, officers are encouraged to look at their jobs in cooperation with the community.[308] Problem-oriented policing focuses on addressing the underlying causes of criminal behavior.[309] Rather than merely responding to reports that crimes have occurred, problem-oriented policing looks for "practical ways to prevent crimes from occurring in the future."[310]

Both community-oriented and problem-oriented policing rely on community involvement. Moreover, these types of policing are often combined

---

303 *See, e.g.*, Banks, *supra* note 43; Sari Horwitz, *'The Ghosts Are Always Around a Little Bit,'* WASH. POST, June 30, 1991, (Magazine), at W11; Doug McInnis, *Police Plan Short North Roadblocks*, COLUMBUS DISPATCH, May 29, 1991, at B1.

304 Horwitz, *supra* note 303.

305 *Id.*

306 SKOLNICK & BAYLEY, *supra* note 4, at 210–11.

307 *Id.* at 29.

308 *Id.* at 211.

309 Michael Tonry, *Public Prosecution and Hydro-Engineering*, 75 MINN. L. REV. 971, 972 (1991).

310 *Id.* at 972–73.

in order to react to local crime trends.[311] For example, in Santa Ana, a city which has experimented with community-oriented policing, when residents near a local park complained of homosexual activity in the park restrooms, an officer was assigned to patrol the area.[312]

Community-oriented and problem-oriented policing may be more suitable long term answers to rising crime rates because these forms of policing do not suffer the same drawbacks as the aggressive policing tactics. First, because these forms of policing focus on positive police-citizen interaction, constitutional problems are less likely to emerge. Second, these forms of policing focus on solving problems rather than making arrests, so they are less likely to exacerbate the problems of courts and jails.

As with aggressive policing tactics, community-oriented and problem-oriented policing are subject to budgetary constraints. However, because these forms of policing change the focus of the "policing goal," a diversion of manpower and resources to community based programs is less likely to cause substantial harm in other areas. In essence, if the community feels like the police department is "doing something" about crime through crime prevention programs, then the community is less likely to demand more expensive specialized units like SWAT teams. Furthermore, if area residents are taught how to help themselves prevent crime, they will need fewer officers on routine patrol.

The greatest challenge for community-oriented and problem-oriented policing is to maintain community involvement. If officers begin to engage in less interaction with area residents, then citizens will feel just as disillusioned as they do when the aggressive programs leave.

C. *A Constitutional Blueprint*

Although community-oriented or problem-oriented policing may be the wave of the future, it would be unrealistic to believe that all police departments can immediately implement programs based on community involvement. Some cities are so plagued with crime that an aggressive approach is needed. Other cities lack a sense of community; thus, officers may have some difficulty finding community groups with which to interact. In these situations, aggressive policing tactics may actually give the neighborhood a sense of community—something to rally behind. Perhaps the best approach in cities such as these is to employ aggressive patrol techniques for a limited time, then switch to a community-oriented or problem-oriented type of policing. This

---

311 SKOLNICK & BAYLEY, *supra* note 4, at 31.

312 *Id.*

subsection serves as a constitutional blueprint for cities which are faced with such a situation.

The first item which police officials should emphasize to uniformed officers when implementing saturation patrols or roadblocks is that the purpose of these programs is to rid the area of criminals, not to harass area citizens. This goal should be reinforced constantly, so that it becomes a part of each officer's mindset. Arrests are not what counts—making the neighborhood safe for law-abiding citizens is what matters.

Second, officials should make clear to officers that if they stop an individual without any articulable suspicion that the individual is committing a crime, then no more than two officers should confront the individual, any requests they make should be made in a non-accusatory, polite tone, and at no time should they display or touch their weapons. And most importantly, if an individual indicates to the officers that he does not wish to be questioned, they should discontinue the contact.

Third, if an officer sees an individual engage in a minor violation such as jaywalking and wants to stop the individual, the officer should immediately inform the individual that he is being detained because he jaywalked. Moreover, to avoid constitutional problems, the officer should request consent before conducting a search or a check for outstanding warrants.

Fourth, in the context of roadblocks, the department should have a clearly articulated policy which shows that the use of the roadblock is directly related to furthering some crime control activity.

Finally, creating a police manual specifically addressing these issues as well as significant Supreme Court decisions is a good idea. Columbus' use of a test is also recommended.[313]

VI. CONCLUSION

Any time that a police department attempts to innovate, police officials are likely to meet with conflict. This reaction is especially true when a police department implements an aggressive policing program. However, at least in theory, programs such as Operation A.C.E., Operation Hammer, Operation Clean Sweep, and the Paramount checkpoints can be tailored to meet constitutional standards. The burden falls upon police officials to draft department guidelines which give officers *specific* information on what to do in their daily encounters. Some suggestions for maintaining constitutionally permissible programs include: 1) emphasizing to officers that the purpose of the program is to deter crime in the area without harassing law-abiding citizens; 2)

---

313 *See supra* notes 37–38 and accompanying text.

stressing that no more than two officers should approach an individual for questioning if the officers do not have articulable suspicion that a crime is being or has been committed; 3) pointing out to officers that they should inform individuals immediately that they will be cited for a minor violation if that is the reason for which the officer initially stopped the person; and 4) creating a clear purpose for roadblocks which is linked to a traffic-related matter. Finally, any department which wants to begin an aggressive policing program should design a manual for affected police officers and create mandatory testing based on the information in the manual.

By implementing such suggestions, police departments will minimize constitutional problems; however, aggressive police programs still must walk a constitutional tightrope since there is great potential for abuse. Moreover, long-term use of aggressive police programs may cause such undesirable results as budgetary problems, over crowded prisons, and over burdened court dockets. Thus, eventually, for the long term, police departments should move toward community-oriented or problem-oriented policing. Under these approaches, the focus is on police-community cooperation. Over the long run, this type of police-citizen contact may be more effective for fighting crime. After all, "feed a man a fish, you feed him for a day; teach a man to fish, you feed him for a lifetime." Perhaps the same can be said for street crime. Teach a community how to solve the causes of crime in their area, and they may resolve crime problems in their neighborhood in the long run.

Adrienne L. Meiring